United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

S.A.M. DATE: May 20, 2015

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Providence Sacred Heart Medical Center, Inland Imaging, LLC, and Inland Imaging Business Associates, LLC, a Joint and/or Single Employer
Case 19-CA-143095

Deferral Chron
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The Region submitted this case for advice as to whether: (1) it is appropriate to defer a single and/or joint employer allegation related to a subcontracting dispute to the parties' contractual grievance and arbitration machinery; and (2) an individual discrimination charge should be deferred under the Board's new deferral standard set forth in *Babcock & Wilcox Construction Co.*[1] We conclude that deferral of the single and/or joint employer allegation is appropriate because it does not present a question concerning representation that militates against deferral and the Union's concern regarding inadequate discovery in arbitration is unwarranted. We further conclude that the individual discrimination charge should be deferred to the parties' grievance and arbitration process under the new standard announced in *Babcock* because the specific statutory right at issue was incorporated into the parties' collective-bargaining agreements.

FACTS

Providence Health & Services operates Sacred Heart Medical Center and Children's Hospital ("the Employer") and has an established collective-bargaining relationship with the United Food and Commercial Workers International Union, AFL-CIO ("the Union"), which represents separate bargaining units of approximately 400 technical employees and 800 service and maintenance employees in the Employer's Radiology Department. Each unit has a collective-bargaining agreement in place: the technical unit agreement is effective January 1, 2013 through December 31, 2015; the service and maintenance unit agreement was effective February 29,

[1] 361 NLRB No. 132 (Dec. 15, 2014).

2013 through December 31, 2014. The parties are in the process of renegotiating each agreement separately.

Each contract has nearly identical subcontracting provisions in place that allow the Employer to "hir[e] another firm to do work that had previously been done within the organization by existing bargaining unit employees. The work may be done by the new firm either inside the organization or at another site."[2] The contracts also require the Employer, prior to making a subcontracting determination, "to meet with the Union to discuss the [Employer's] assessment and consider the feasibility of creating and/or implementing alternatives to the contracting that would satisfy [the Employer's] primary business needs." Further, if subcontracting will result in bargaining unit layoffs, the Employer must give the Union sixty days' notice and, at the Union's request, meet to discuss the effects. Finally, where layoffs will occur, "the [Employer] will make a good faith effort to obtain preferential hiring opportunities with the contracting entity for affected employees . . . ."

Article 5.6 of each contract also contains nearly identical "Equal Opportunity" language that prohibits "discrimination against any employee or applicant for employment because of race, color, creed, national origin, religion, sex, age, handicap, marital status, sexual orientation or *Union membership* unless any one of the foregoing factors constitutes a bona fide occupational qualification" (emphasis added).

In September 2014,[3] the Employer notified the Union that it was considering contracting out some of its imaging services to a third party and expected that this would result in the elimination of some positions in both units. The Union then submitted an extensive request for information and suggested several alternatives prior to the parties meeting to discuss the issue on September 26. During that meeting, the Employer stated that it was considering subcontracting imaging services to "Inland Imaging," a radiology service provider closely affiliated with the Employer's other hospitals. The Employer did not specify at this meeting which Inland Imaging entity it was considering for the work. The Employer had formed a joint venture with Inland Imaging Business Associates, LLC, which the Employer asserts is an independent entity. The joint venture is called Inland Imaging, LLC, and while the Employer has a 50% financial interest in that business, it is not involved in its management or daily operations.

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[2] The organization of the provisions differs in each contract, but the language is essentially the same. The technical unit contract houses the entire provision in Article 5.9. The service and maintenance contract splits the language between Article 5.9 and an attached memorandum of understanding.

[3] All dates hereinafter are in 2014 unless otherwise stated.

On October 23, the Employer gave the Union its final notice that it would subcontract bargaining unit work in several imaging departments to Inland Imaging Business Associates, LLC, which would affect employees in both units. On October 30, the Union filed a grievance under both the service and technical agreements alleging that the Employer had violated Article 5.9 of its agreements with the Union by: (1) contracting with "itself" because the Employer purportedly owns and controls the subcontractor; (2) failing to properly consider the Union's proposed alternatives to contracting out; and (3) failing to obtain preferential hiring treatment for all impacted bargaining unit members. The Employer's response to the grievance was that it did not subcontract the work to itself; rather, it had subcontracted the imaging work to Inland Imaging Business Associates, LLC. The Employer informed the Union in an email that although it and Inland Imaging Business Associates, LLC had formed a joint venture called Inland Imaging, LLC, the joint venture would not be performing the subcontracted work.

On December 8, the Employer notified the Union that imaging employees in several job classifications would be laid off effective December 31. Employees were then told that they could apply for employment with Inland Imaging at a job fair.[4] Most of the impacted employees attended the job fair, completed online applications, and were interviewed. Approximately 75% of employees who applied for Inland Imaging jobs were offered positions.[5] However, a long-time employee who was one of the Employer's most outspoken Union activists was not offered a position.

On December 16, the Union filed the instant charge, which tracks the grievance allegations and includes a Section 8(a)(3) allegation based on Inland Imaging's refusal to hire the Union activist. The Union then amended the charge to allege that the Employer, Inland Imaging, LLC, and Inland Imaging Business Associates, LLC, are single and/or joint employers.

The Employer seeks deferral of the charge to the parties' grievance and arbitration machinery, and it has agreed to waive any contractual time limitations on the filing and processing of grievances to arbitration. The Employer claims that the Section 8(a)(3) refusal-to-hire allegation, which is not part of the Union's grievance, is also suitable for deferral because the parties' contracts include a clause that prohibits discrimination based on, among other things, "Union membership." The Union opposes deferral primarily because it claims a question concerning representation

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[4] There is conflicting evidence as to whether the employees were applying for a job with Inland Imaging Business Associates, LLC, or Inland Imaging, LLC. Thus, we refer solely to "Inland Imaging" as the employing entity.

[5] The exact number is unknown because Inland Imaging, LLC and Inland Imaging Business Associates, LLC have failed to cooperate with the Region's investigation.

underlies the dispute and that the Board is best equipped to decide the single and joint employer issues. The Union also opposes deferral because it asserts that an arbitrator lacks authority to order adequate discovery on the single and joint employer issues.[6]

Since January 2015, many of the unit employees affected by the Employer's subcontracting decision have been employed and supervised by Inland Imaging. As a result, their wages have been reduced significantly and they have been removed from the Employer's 401(k) and health insurance plans.

ACTION

We conclude that it is appropriate to defer the single and/or joint employer allegation to the parties' grievance and arbitration process because it does not present a question concerning representation that is typically resolved by the Board and the Union's concern regarding inadequate discovery in arbitration is unwarranted. Further, as to the Section 8(a)(3) refusal-to-hire charge, we conclude that deferral here is appropriate and should be analyzed using the Board's new standard enunciated in *Babcock* because the statutory right at issue was explicitly incorporated into the parties' collective-bargaining agreements.

A. The Single and Joint Employer Questions are Appropriate for Deferral.

"Where an employer and a union have voluntarily elected to create dispute resolution machinery culminating in final and binding arbitration, it is contrary to the basic principles of the Act for the Board to jump into the fray prior to an honest attempt by the parties to resolve their disputes through that machinery."[7] While the Board promotes the collective-bargaining process by holding contracting parties to their agreed-on dispute resolution procedure, it retains jurisdiction over a dispute subject to that procedure to ensure that the matter has been resolved with reasonable promptness, that the grievance and arbitration procedures were fair and regular, and that the result reached is not repugnant to the Act.[8]

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[6] The Union appears to find inadequate the language in Article 14.5.3 of each contract, which states in relevant part that, "[i]f necessary, the [a]rbitrator shall resolve discovery rights of the parties as to grievances submitted to arbitration."

[7] *United Technologies Corp.*, 268 NLRB 557, 559 (1984).

[8] *Id.* at 561; *Collyer Insulated Wire*, 192 NLRB 837, 843 (1971). *See also Laborers Local 294 (AGC of California)*, 331 NLRB 259, 260 (2000) (finding post-arbitration deferral appropriate because, among other things, the arbitration proceedings were fair and regular where employees in a grievance against the union were represented by independent counsel, not union counsel, and the "arbitrator had all the relevant

Despite these policies favoring pre-arbitration deferral, a charge is generally not deferrable if it encompasses a representation question because that is a matter for the Board to decide rather than an arbitrator.[9] In *Marion Power Shovel*, the Board explained that representation questions are typically not deferrable because they "do not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria."[10] Further, in *Asbestos Carting Corp.*[11] the Board found deferral of single employer and alter-ego issues inappropriate because those determinations would have raised a unit accretion issue that "involve[d] application of statutory policy, standards, and criteria [that] are matters for decision of the Board rather than an arbitrator."[12]

[hiring hall] records to permit a fair resolution" of whether the union had breached the contract provisions on the exclusive hiring hall).

[9] *Marion Power Shovel Company, Inc.*, 230 NLRB 576, 577-78 (1977) (finding unit clarification issue not suitable for arbitration where conflicting claims to representation were present due to the employer's reorganization and expansion of its facilities).

[10] *Id.* at 577.

[11] 302 NLRB 197 (1991).

[12] *Id.* at 197. *See J. E. Higgins Lumber Co.*, 332 NLRB 1172, 1176 & n.4 (2000) (finding deferral of single and/or joint employer determination inappropriate because it was determinative issue as to unit placement of employees referred by temporary staffing agency who was alleged to be a joint employer with user employer). However, the Board will defer to arbitration in a representation context when resolution of the issue turns solely on the proper interpretation of the parties' collective-bargaining agreement. *See St. Mary's Medical Center*, 322 NLRB 954, 954 (1997) (finding that Regional Director acted appropriately by limiting scope of deferral to issue that turned solely on interpretation of recognition clause's exclusion language, but explicitly refusing to defer resolution of accretion issue); *Central Parking System*, 335 NLRB 390, 390-91 (2001) (citing *St. Mary's* in finding that deferral to arbitration was appropriate despite the presence of a representation issue because the primary issue turned on whether there was an "after-acquired" clause in the parties' agreement that would then resolve all other issues); *Appollo Systems, Inc.*, 360 NLRB No. 80, slip op. at 1-2 (Apr. 24, 2014) (citing *St. Mary's* in finding deferral to arbitration appropriate, including resolution of single employer issue, because case involved "classic questions of contract [that] are not the unique province of the Board . . . [and] may reasonably be left to the parties' contractual grievance and arbitration procedure").

On the other hand, arbitrators routinely resolve single and/or joint employer issues outside the representational context to determine whether a contracting party has violated the terms of an applicable collective-bargaining agreement. For example, in the *Walt Disney World Co. v. Carpenters Local 1820* arbitration proceeding, the union's grievance alleged that Disney had breached the parties' collective-bargaining agreement by subcontracting unit work to avoid hiring new bargaining unit maintenance employees.[13] Disney's defense, in part, was that the contract specified four exceptions that permitted subcontracting unit work, including where no full-time unit employee was laid off or terminated, which Disney asserted was applicable. In sustaining the union's grievance, the arbitrator concluded, among other things, that Disney and its subcontractor were a single employer under the Board's four-part test.[14] Based on this single employer finding, Disney breached the contract because "the contracting of a single employer with itself" was not a bona fide subcontracting arrangement that qualified for one of the four exceptions set forth in the collective-bargaining agreement.[15]

Here, deferral to arbitration is appropriate because the case presents a contract dispute similar to that in *Walt Disney World*, rather than a question concerning representation. Resolution of the Union's grievance revolves on a finding of single or joint employer status between the Employer and the Inland Imaging entities that will allow the arbitrator to determine whether the Employer breached the contract by subcontracting with itself. If the arbitrator finds single or joint employer status, the Employer will have breached its contractual obligations and the Union will receive the appropriate remedy in that forum. If the Employer and the other entities are found to be separate employers, that will not lead to a consideration of whether the Union

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[13] *See* 2009 WL 8160765, at § A (2009) (Hoffman, Arb.).

[14] *Id.* at § C.2. (citing, among other cases, *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 80 (1995)).

[15] *Id.* at § C.2. *See also Freeman United Coal Mining Co. v. Mine Workers District 12 & Local 12*, 2004 WL 6012757 at § Opinion (E) (2004) (Murphy, Arb.) (denying union's grievance that employer had breached the parties' contract by subcontracting unit work where the disputed work was performed after the employer had sold its processed coal and, therefore, the union no longer had jurisdiction over it; in reaching his overall conclusion, the arbitrator found that the employer and the entity performing the disputed work were not a single employer so that the union's jurisdiction ceased at the point of sale); *Mike-Sell's Potato Chip Co. v. Teamsters Local 957*, 90 LA 801 (1988) (Cohen, Arb.) (stating that resolution of single-employer status would allow arbitrator to then determine whether employer violated the driver-equipment and subcontracting provisions of the parties' collective-bargaining agreement).

represents Inland Imaging's employees. At no point will the arbitrator be required to apply statutory standards and criteria related to a question concerning representation.

Furthermore, the Union's concern regarding the arbitrator's alleged lack of authority to order discovery on the single and joint employer issues does not defeat the appropriateness of deferral. The Board's policy is to encourage collective bargaining by requiring parties to abide by the grievance-arbitration procedure they have established through negotiations.[16] The Union has failed to provide any explanation why an arbitration hearing here would not be fair and regular so as to preclude it from fully presenting its grievance. Most important, the Union specifically agreed in Article 14.5.3 of each contract to have the arbitrator resolve the parties' discovery rights in the arbitration proceeding. In light of these considerations, it would undermine the Act's principles for the Board to bypass the parties' contractual grievance-arbitration procedure.[17]

B. Pre-Arbitration Deferral is Appropriate Here Under *Babcock* Because the Statutory Right at Issue Was Incorporated into the Parties' Contract.

Recently, in *Babcock & Wilcox Construction Co.*,[18] the Board revisited its post-arbitration deferral standard because it did not adequately balance the protection of employee rights under the Act with the national policy of encouraging arbitration of disputes over the application or interpretation of collective-bargaining agreements. Under the new post-arbitration deferral standard, a threshold requirement is that the arbitrator explicitly have been authorized to decide the statutory issue, as set forth in the collective-bargaining agreement or by explicit agreement of the parties in a particular case.[19] The *Babcock* Board also determined that its modifications to the standard for reviewing arbitral awards necessitated a change in the criteria for administratively placing a Section 8(a)(3) charge on pre-arbitration deferral under

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[16] *See, e.g., United Technologies Corp.*, 268 NLRB at 559.

[17] In any event, the Region could consider in a potential post-arbitration review under *Spielberg/Olin* whether the Employer refused to provide relevant information that precluded the Union from fully presenting its grievance to the arbitrator. "The Board will not defer to arbitration awards where an employer has unlawfully withheld information relevant to the arbitration proceeding." *Western Golf & Country Club*, 335 NLRB 1085, 1089 (2001).

[18] 361 NLRB No. 132 (Dec. 15, 2014).

[19] *Id.*, slip op. at 2, 5.

Collyer Insulated Wire[20] and *United Technologies Corp.*[21] Because it would be futile to place a case on hold pending arbitration if it is clear from the outset that deferral to the ultimate award would be improper, the Board will no longer defer cases to the arbitral process unless the arbitrator is explicitly authorized to decide the statutory issue.[22] Although the Board did not indicate whether this new pre-arbitration deferral standard would apply prospectively or retroactively, we infer that the new pre-arbitral deferral standard will apply only if the new post-arbitral deferral standard would apply to the ultimate arbitration.[23] Therefore, the new standard for pre-arbitration deferral set forth in *Babcock* applies where the parties have already authorized an arbitrator, either contractually or explicitly for a particular case, to decide the unfair labor practice claims at issue.[24]

Here, we conclude that deferral of the Section 8(a)(3) allegation involving the Union activist is appropriate pursuant to *Babcock* because the parties' contracts explicitly authorize an arbitrator to decide whether the Employer discriminatorily refused to retain that employee.[25] The contracts contain "Equal Opportunity"

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[20] 192 NLRB at 841-42.

[21] 268 NLRB at 558.

[22] *Babcock*, 361 NLRB No. 132, slip op. at 12-13.

[23] *See* Office of the General Counsel, "Guideline Memorandum Concerning Deferral to Arbitral Awards, the Arbitral Process, and Grievance Settlements in Section 8(a)(1) and (3) cases," GC Memorandum 15-02, Feb. 10, 2015, at 11.

[24] *Babcock*, 361 NLRB No. 132, slip op. at 14. Where the parties' current contract does not authorize an arbitrator to decide the statutory issue and the parties will not agree to have the arbitrator do so, the Board will apply its previous deferral standard under *Collyer* and *United Technologies*. *Id.* *See also* GC Memorandum 15-02, at 9 (stating that for contracts executed prior to December 15, 2014, the applicable deferral standard depends on whether the arbitrator was explicitly authorized to decide the statutory question).

[25] If the arbitrator finds that the Employer and Inland Imaging are a single or joint employer, and orders rescission of the "subcontract," the employee will be reinstated along with the other displaced employees. In that event, although the arbitrator may not need to decide the discrimination question, the employee's statutory rights will have been protected. If the arbitrator finds that the Employer and Inland Imaging are separate entities, he will not resolve the discrimination issue because Inland Imaging is not a party to the contracts. In that event, the Region's post-arbitration *Spielberg/Olin* review should consider whether to go forward with the Section 8(a)(3) allegation against Inland Imaging, who is named as a respondent in the charge.

provisions that prohibit discrimination based on, among other things, "Union membership." The Supreme Court and the Board have long held that the term "membership," in the context of Section 8(a)(3), should be broadly construed.[26] In *Radio Officers'*, the Supreme Court explained that the term "membership" includes the "right guaranteed by the Act to join in or abstain from *union activities* without thereby affecting [an employee's] job" and that "[t]he language of §8(a)(3) is not ambiguous[;] [t]he unfair labor practice is for an employer to encourage or discourage membership by means of discrimination."[27] Therefore, the term "membership" in the contracts' "Equal Opportunity" provisions covers the panoply of rights protected under Section 8(a)(3) because it extends to "union activities" in support of membership. Accordingly, because the statutory right applicable to the discrimination charge here has been explicitly incorporated into the parties' contracts, the charge should be deferred to arbitration under the new standard set forth in *Babcock*.

Based on the preceding analysis, the Region should defer the current charge allegations to the parties' grievance and arbitration machinery.

/s/
B.J.K.

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[26] *See Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-40 (1954); *Derr & Gruenewald Construction Co.*, 315 NLRB 266, 267, 270 (1994) (finding post-arbitral deferral appropriate in refusal-to-hire case where contract prohibited deeming an applicant unqualified because of his "union membership," which includes "union activities in the same way that the term 'membership' in Section 8(a)(3) of the Act has been interpreted to include such activities").

[27] *Radio Officers'*, 347 U.S. at 42 (emphasis added). *See, e.g.*, *Derr & Gruenewald Construction Co.*, 315 NLRB at 267, 270; *T. K. Productions*, 332 NLRB 110, 124 (2000) (quoting *Radio Officers'* for the proposition that the thrust of an 8(a)(3) violation is to discriminate for the purpose of encouraging or discouraging union membership).